

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 261 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT

Versus

VIJAYSINH SAITANSINH

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Appearance:

MR BY MANKAD, ALL. PUBLIC PROSECUTOR for appellanr  
MR RR TRIPATHI for AR SHAIKH for  
Respondent No. 1, 2, 3, 4  
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CORAM : MR.JUSTICE B.C.PATEL

Date of decision: 25/09/98

ORAL JUDGEMENT

State, being aggrieved by an order of acquittal recorded on 17.1.1991 by Judicial Magistrate First Class, Bhavnagar in Criminal Case No. 290 of 1989 wherein the accused were tried for an offence punishable under section 3 of the Railway Property (Unlawful Possession) Act, 1966 (hereinafter referred to as the Act), has preferred this appeal.

2. Short facts as it emerges from the record are as under :-

2.1 Inspector of Railway Protection Force (hereinafter referred to as the R.P.F.) received a secrete information on 13.3.1989 that theft of railway property is being committed at the Patadi Railway Yard. Hence, along with Sub-Inspector and staff she searched a residential premises situated just opposite railway station and behind the railway chawl allegedly occupied by the respondents No. 1 to 4 (hereinafter referred to as the accused No. 1 to 4) which was being used as a place for storing the railway property secretly. search warrant was obtained and with the aid of the warrant, the aforesaid premises was searched, but nothing was found from within the house. However, the raiding party consisting of Sub-Inspector Saroj with his staff members found in the compound a heap of coal and iron scrap at some distance near the fencing. Coal was weighing about 3.0 Tons which was valued at Rs.4000/-; Plates of different sizes, 71 and 61 in numbers, weighing about 700 kgs. valued at Rs.6800/- came to be seized under a panchnama. The investigation was taken over by the Inspector. Accused were found absconding. However, Vijaysinh, accused No.1, on his arrest was questioned about others who were absconding and he stated that they have taken shelter in the 'Ran' (desert) and he disclosed his willingness to show them. As per the information given by the accused No.1, the remaining accused were traced and brought from the 'Ran'. On showing the muddamal, they identified and stated that all the four brothers were braking railway wagons and were bringing the coal from empty wagons and cleaning it, they used to store in the compound. After completion of the investigation, complaint was filed before the Court. On appreciation of evidence, the trial Court came to the conclusion that the accused are not guilty and acquitted the accused, against which the present appeal is preferred by the State.

3. On behalf of the accused, Rasulbhai Davudbhai has been examined, who deals in scrap in the name of New National Steel. It is suggested by this witness that some scrap was sold to Vijaysinh accused No.1 and has produced xerox copy of cash memo dated 6.3.1989 at Exh. 26. This is with a view to show that some scrap material came to be purchased by the accused. However, learned Additional Public Prosecutor submitted that some of the muddamal article recovered from the compound of the accused belongs to the Railways and, therefore, the accused should be held guilty.

3.1 This witness has stated on oath that he has supplied scrap material to Vijaysinh Saitansinh for which he has given cash memo dated 6.3.1989, vide Exh.26. His evidence is attacked on the ground that it is not acceptable because he has not seen the muddamal article and he is merely signing the bills. The bill book which was produced also creates doubt whether the same is regularly used for the purpose of business or not. He has admitted that the bill issued is from a bill book where there are blank bills, and bills are not issued in serial number and last but one bill is issued in favour of the accused. He has further stated that for sales tax purposes, certain bills are kept blank. Learned APP submitted that the story is: New Star Steel supplied goods to New National Steel, vide Exh. 26 dated 4.3.89 and New National Steel supplied goods to accused No.1 on 6.3.86. However, none of the bills refer to flap doors of wagon and the bills refer to wagon sheets, and junk 'kachara'. He further submitted that even if the evidence of this witness is accepted, the defence has not pointed out anything to show that this witness supplied flap doors of the wagon to the accused No.1. On an overall consideration of the evidence of this witness, this Court is of the view that the evidence of this witness cannot be relied upon.

4. Prosecution has examined Ram Prasad PW. 1 who has stated that coal, plates for fitting and the doors (shutter or flap door of wagon) were recovered. He has further stated that nothing was found from the house but the muddamal was found from the fenced compound of a house which was searched. He has admitted that Railway is disposing scrap by auction. However, he has stated that it is not true that the muddamal found from the accused is purchased in auction. He has admitted that there were no markings of the railways on the material seized.

5. Mohanlal PW. 2 who was entrusted with the investigation has deposed about the accused being absconding and that on arrest, they voluntarily gave statements before the police stating that the property seized from the compound is railway property and that no bill or receipt was produced for possessing the same. Xerox copy of ration card was collected as an evidence to establish occupancy of the premises.

5.1 There are two ration cards, one in the name of Thakore Vijaysinh Saitansinh bearing Number 541188 and the other in the name of Saitansinh Jamadarsinh bearing

number 541186. Surprisingly, except mentioning of house number as 2938 in one of the ration cards, no other details about the address of the residential premises, such as street number, house number, name of street are mentioned in the ration cards.

6. it is submitted by the learned APP that considering the statements which are at Exhs. 15, 16, 17 and 18, it is clear that all the accused at the relevant time were residing together and were indulging in theft of railway property, as and when opportunity was made available. He further submitted that from the ration card it can be safely presumed that the accused are members of a joint family. From the statement, he submitted that it is clear that they were residing at the same place.

7. Mr. Tripathi, learned counsel appearing for the accused submitted that no reliance can be placed on the confessional statement alleged to have been recorded by the Investigating Officer. he submitted that it is not a statement given by the accused but in a prepared statement, signatures have been obtained. By reading the statement, he pointed out that from top to bottom, except name, age and signature of persons, all the four statements are verbatim similar. Learned APP on going through the statement was not in a position to point out any difference in the statements except the house number in one statement being different than others. In view of this, it is difficult to accept that these statements were made by the accused. It appears that on prepared statements, their signatures were obtained. If the accused have given their statements, it can never be verbatim similar and there is bound to be variation and difference in language, manner of stating the events etc. It is therefore, not possible to believe that the statements at Exh. 15, 16, 17 and 18 are the statements given by the accused. Learned APP was also not in a position to point out difference in language, full stop etc. in the statements. Therefore, this Court cannot believe these statements to be statements given by the accused and cannot rely on such statements. Therefore, such statements cannot be considered against the accused.

8. So far as the ration cards are concerned, no details are given about the locality, street number, house number etc. House number referred to in the alleged statement of the accused is different from the number mentioned in the ration card in the name of Thakore Vijaysinh. Therefore, the ration card also cannot be used against the accused persons.

9. For establishing that the property is Railway property, prosecution has examined Gomayarao, PW. 3. He has deposed that two doors and different sizes of plates, 132 in number, are of box wagons, which are serviceable parts. He has also given certificate to the effect that the muddamal article is Railway property. He has denied the suggestion that the muddamal was old and not serviceable.

9.1 In the absence of any marking and reliable evidence, it becomes difficult for the Court to come to a conclusion that the muddamal article is railway property.

10. Referring the deposition of defence witness Rasalbhai, learned APP submitted that it is clear that atleast accused No. 1 Vijaysinh is admitting the ownership of the goods, and, therefore, it can be said that Vijaysinh Accused No.1 was the person who was in possession of the goods. He further submitted that as there is nothing to show as to how accused No.1 came in lawful possession of flap doors, the accused must be held guilty. Learned APP submitted that vide panchnama Exh. 23, the Sub-Inspector of RPF on 15.3.1989 seized the muddamal articles. Looking to the quantity of goods and the nature of the goods, it cannot be said that the investigating officer brought the material at the place of the accused for roping the accused in a criminal trial.

10.1 Both the panchas have turned hostile. One panch examined at Exh.24, is an Assistant Station Master of the Railways. He has been declared hostile by the prosecution. he has stated on oath that he signed the panchnama and he has not acted as a Panch, but on a prepared statement his signature was taken by the RPF personnel. He has admitted that he is an educated person and the officers of the RPF have not obtained his signature by any coercion. It is the case of the accused No.1 that he has purchased the material from Rasalbhai. In view of the nature and weight of the material, it cannot be said that it is planted by the Investigating Officer.

10.2 It is also the case that the muddamal article was recovered from the compound of the accused. At present I am not dealing with the question whether the property is railway property or not, but only with regard to the finding of the muddamal to which Mahesh PW. 6, Assistant Station Master was a panch. If his signature was obtained on a document which was ready, he would have

immediately complained to higher authorities or to the superior officer of the Investigating Officer. He is not a layman, but he is an Assistant Station Master. Learned APP submitted that Railways should take action against such employees. Prima facie it appears that Mahesh PW. 6 is not telling the truth. This Court could have taken action against this witness, but for the fact that the matter is very old, this Court would not like to take any action in the matter now. However, if it is permissible, it would be open for the Railways to take appropriate action against this witness.

10.3 Another panch Amrutbhai, PW. 5 has also turned hostile and he has been declared hostile by the prosecution as such.

11. From the aforesaid discussion it transpires that the prosecution case is that all the four accused were in possession of the muddamal; the muddamal property belong to the Railway. However, in the instant case, the prosecution has miserably failed to prove that the accused were in conscious possession of the property. Because in the statement they have admitted, a view could have been taken that they were in possession, but Court is of the view that on a prepared statements, signatures were taken, and hence on the basis of the statements, accused cannot be convicted. The prosecution has not lead any convincing evidence to show that how the accused are connected with the crime in question.

12. Learned APP submitted looking to the quantity and nature of the muddamal, if the four brothers were staying together it can be safely presumed that they knew about the same. In the instant case, it is not possible to believe that an outsider would keep the property of the nature and size recovered from the compound of the accused. None would store there or would be permitted to store without the knowledge of the accused. An important aspect which must be stated in the instant case is that none of the accused were present at the time when the raiding party recovered the muddamal. If the presence of the accused at the time of recovery would have been established, the matter would stand on a different footing. It is not a case of criminal conspiracy to deal in stolen property .

13. In the absence of convincing evidence about conscious possession, prosecution has failed to establish the charge. There is no convincing evidence that property is railway property.

14. Moreover, this is an appeal against the order of acquittal. The Court has carefully gone through the evidence which was suggested to be read by learned Additional Public Prosecutor. In an appeal against the order of acquittal, though there is no limitation upon the power of the High Court to review at large the evidence upon which the acquittal was founded and to reach to a conclusion that the order of acquittal should be reversed, in exercising that power and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1). the view of the trial judge as to the credibility of the witnesses; (2). the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3). the right of the accused to the benefit of any doubt, and, (4). the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses (See AIR 1934 PC 227).

14. Under the circumstances, it is difficult to hold that the trial Court has committed an error in acquitting the accused. Hence this appeal fails, and is dismissed.

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